IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

THURSDAY, THE 5TH JULY 2007 / 14TH ASHADHA 1929

SA.No. 139 of 1994()

(AGAINST THE DECREE AND JUDGMENT DATED 16/06/93 IN AS.177/1989 of the SUBORDINATE JUDGE, PAYYANNUR AGAINST OS.205/1986 of the MUNSIFF COURT, PAYYANNUR)

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APPELLANTS:RESPONDENTS:DEFENDANTS:

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1. **STATE OF KERALA, REPRESENTED BY THE CHIEF SECRETARY, TRIVANDRUM.**

2. **DIVISIONAL FOREST OFFICER, TELLICHERRY.**

3. **FOREST RANGE OFFICER, TALIPARAMBA.**

BY SPL.GOVERNMENT PLEADER SRI.PRAKASH

RESPONDENT:APPELLANT:PLAINTIFF:

KUTTIYANIKKAL ELIYAMMA, W/O.JOSEPH, AGRICULTURIST, VAYAKKARA AMSOM, PULINGOME DESOM.

BY ADV. SRI.M.VIJAYAKUMAR
SRI.M.S.MANIKANTAN
SRI.A.KUMAR

THIS SECOND APPEAL HAVING BEEN FINALLY HEARD ON 05/07/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

M.SASIDHARAN NAMBIAR,J.

S.A.NO.139 OF 1994

Dated 5th July 2007

J U D G M E N T

Defendants in O.S.205 of 1986 on the file of Munsiff court, Payyannur are the appellants. Plaintiff is the respondent. Respondent instituted the suit seeking a decree for permanent prohibitory injunction contending that plaint schedule property having an extent of 4 acres in R.S.127/1 of Vayakkara village originally belonged to Mavila veedu and was obtained on kuzhikanam right by Pachikkara Vakkil. As per an oral lease in 1960 respondent obtained the property and later purchased jenm right from Land Tribunal as per order in O.A.2099 of 1972 and has been in possession of the property. It was also contended that while so, Government issued a notification declaring certain portions of R.S.No.127/1 as vested forest and respondent thereafter filed O.A.287 of 1974 before Forest Tribunal contending that 4 acres in her possession, which is being cultivated is not part of vested forest. Under Ext.A10 order it was held that

it is not part of vested forest. Contending that third appellant forest Range officer attempted to trespass into the plaint schedule property claiming that it is part of vested forest a decree for permanent prohibitory injunction was sought for. Appellants 2 and 3 filed a joint written statement admitting that respondent filed O.A.287 of 1974 and plaint schedule property is the property covered thereunder and that property was not part of the vested forest and it is in the possession of respondent. But it was also contended that under the strength of that order, respondent is not entitled to encroach upon the forest land and therefore, respondent is not entitled to the decree sought for.

2. A commission was appointed and Commissioner submitted Ext.C2 report and Ext.C1 plan. In Ext.C1 plan commissioner has shown the disputed property as suit property having an extent of 3.65 acres. Learned Munsiff on the evidence of PW1, DW1 and Exts.A1 to A10 and C1 to C2 dismissed the suit holding that respondent did not establish that plaint schedule property is the property covered under Ext.A10 order. Respondent challenged the decree and judgment before Sub court, Payyannur in A.S.177 of 1989. Learned Sub Judge on re-appreciation

of evidence found that appellant did not dispute the identity of the plaint schedule property as the property covered under Ext.A10 order and therefore held that respondent is entitled to the decree sought for. Appeal was allowed and a decree for permanent prohibitory injunction was granted. It is challenged in second appeal.

3. Second appeal was admitted formulating the following substantial questions of law.

> Is the plaint schedule property involved in the suit is a part of the vested Forest covered by Act 26 of 1971.

4. Learned Government Pleader appearing for appellants was heard. There was no representation for respondent.

5. Specific case of respondent in the plaint was that plaint schedule property was the property covered under O.A.287 of 1974 and under Ext.A10 order forest Tribunal found that it is not part of the vested forest and therefore appellants have no right over the property. Appellants in the written statement did not deny these facts. On the other hand, it is admitted in the written statement that respondent filed O.A.287 of

1974 and as that property covered thereunder was not part of the vested forest, that O.A was allowed and respondent is in possession of that property. Appellants in the written statement also admitted that plaint schedule property is the property covered involved in O.A.287 of 1974. In such circumstances, first appellate court was correct in holding that the appellants are not entitled to contend that plaint schedule property is not the property which was found to be not part of the vested forest in O.A.287 of 1974 as evidenced by Ext.A10 order.

6. Evidently, case of appellants was not properly projected in the written statement. A reading of written statement shows that what was intended by appellants was that by making use of Ext.A10 order respondent is not entitled to claim further land from the vested forest. But unfortunately such a case was not specifically pleaded. In the absence of such pleading findings of first appellate court cannot be interfered. It is more so, because even at the time of evidence there was no specific case that respondent is in possession of any other land and that land is the one involved in Ext.A10 order. In such circumstances, I find no reason to

interfere with the decree granted by first appellate court. But it is made clear that the decree granted in the suit is only in respect of the extent found by the Commissioner in Ext.C2 report and Ext.C1 plan. It is also clarified that by the decree respondent is not entitled to claim any further extent than what is covered under Ext.A10 order and the decree is granted on the basis that plaint schedule property is the property covered under Ext.A10 order and the decree is only in respect of the property involved in O.A.287 of 1974.

Second appeal is dismissed.

M.SASIDHARAN NAMBIAR,
JUDGE.

uj.

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M.SASIDHARAN NAMBIAR,J.

JUDGMENT

S.A.NO.139 OF 1994

5th JULY 2007

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